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No. 88-1147

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OKLAHOMA, PETITIONER

v.

CHESTER LEE BROOKS, AKA ACHISSON AMENSHI, AND LARRY JOE BROOKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the State of Oklahoma has jurisdiction to prosecute respondents, who are members of the Delaware Tribe of Indians, for violating the State's tax and record-keeping laws in connection with respondents' sales of cigarettes to both Indians and non-Indians on a restricted allotment leased from a member of the Creek Nation.

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INTEREST OF THE UNITED STATES

The interest of the United States arises out of its special relationship with Indian tribes and the need to clarify the respective jurisdictions of the United States and the State of Oklahoma on individually owned restricted Indian lands within the portion of eastern Oklahoma that formerly constituted the territory of the Five Civilized Tribes. The United States Attorneys and the district attorneys of 40 counties in Oklahoma are unsure, in light of recent judicial decisions, which sovereign has jurisdiction to prosecute Indians for offenses committed on these Indian lands. Because of these interests, the United States filed a brief as amicus curiae in support of the State in the Oklahoma Court of Criminal Appeals.

STATEMENT

In the late 19th Century, the Five Civilized Tribes[1] occupied most of the land in the Indian Territory, which now comprises eastern Oklahoma. In preparation for the admission of Oklahoma to the Union, Congress passed a number of statutes that contemplated the elimination of the Tribes' governmental powers, provided for the allotment of their lands, and subjected members of the Tribes to the full criminal and civil jurisdiction of the State, even on trust or restricted lands. Oklahoma has exercised that jurisdiction over Indians. See *Ex parte Nowabbi*, 61 P.2d 1139, 1156 (Okla. Crim. App. 1936) (sustaining state jurisdiction over murder of Choctaw Indian by another Choctaw Indian on restricted allotment). In this case, however, the Oklahoma Court of Criminal Appeals held that the State may not tax or impose record-keeping requirements on sales of cigarettes by Indians to other Indians on the restricted allotment of a member of the Creek Nation. This ruling is inconsistent with the long-held understanding that actions by Indians on Indian allotments within the former territory of the Five Civilized Tribes are subject to the civil and criminal jurisdiction of the State to the same extent as if they involved non-Indians and occurred on non-Indian land.

A. The Jurisdictional History of the Indian Territory

1. In the 1830s, the Five Civilized Tribes were removed from their homelands in the southeastern United States to the then-unsettled region west of Arkansas, in what is now the State of Oklahoma. In various removal treaties, the Five Civilized Tribes were granted their new land in fee simple, with the right of perpetual self-government. *Atlan-*

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[1] The "Five Civilized Tribes" are the Creek (Mūscogee), Choctaw, Chickasaw, Seminole and Cherokee Tribes.

tic & Pac. R.R. v. *Mingus*, 165 U.S. 413, 436-437 (1897); Cohen, *Handbook of Federal Indian Law* 426-427 (1942). After the Civil War, the Five Tribes ceded the western portion of their territory, but their right of self-government was once again affirmed. Treaty with the Seminole Indians, Mar. 21, 1866, art. VII, 14 Stat. 758; Treaty with the Choctaw and Chickasaw Indians, Apr. 28, 1866, art. VIII, 14 Stat. 772; Treaty with the Creek Indians, June 14, 1866, art. X, 14 Stat. 788; Treaty with the Cherokee Indians, July 19, 1866, art. XII, 14 Stat. 802.

Over time, law enforcement became a problem in the area that the Five Tribes retained because the tribal courts did not have jurisdiction over the increasing number of non-Indian residents. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-200 (1978); Cohen, at 427. In response, Congress, in the Act of March 1, 1889, ch. 333, § 1, 25 Stat. 783, created a "United States court" having exclusive jurisdiction over "all offenses against the laws of the United States committed within the Indian Territory" that were not punishable by death or imprisonment at hard labor (§ 5, 25 Stat. 783; see note 2, *infra*) and over certain civil cases (§ 6, 25 Stat. 784).

In the Act of May 2, 1890, ch. 182, 26 Stat. 81, Congress established the Territory of Oklahoma in the western portion of the Indian Territory, which previously had been ceded by the Five Tribes (§§ 1-28, 26 Stat. 81-93), and expanded the jurisdiction of the United States court in the diminished Indian Territory (§§ 29-44, 26 Stat. 93-100). The civil jurisdiction of the court was extended to all civil suits excepts those over which the tribal courts had exclusive jurisdiction (§ 29, 26 Stat. 93-94; see also § 36, 26 Stat. 97). The 1890 Act also provided that the general laws of the United States that prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States "shall have the same force

and effect in the Indian Territory as elsewhere in the United States" (§ 31, 26 Stat. 96). The criminal laws of Arkansas (with certain exceptions) were extended to the Indian Territory for offenses not governed by federal law (§ 33, 26 Stat. 96-97). See Cohen, at 427-428.[2] However, the 1890 Act expressly did not deprive the courts of the Five Tribes of their "exclusive jurisdiction" over all cases in which tribal members were the "sole parties" and did not interfere with their right to punish members for the violation of tribal laws that were not contrary to treaties and laws of the United States (§ 31, 26 Stat. 96).

Before long, however, Indians were brought under the same jurisdictional and substantive laws that applied to non-Indians in the Indian Territory. First, the Indian Department Appropriations Act of 1897, ch. 3, 30 Stat. 62, vested the United States courts in the Indian Territory with "exclusive jurisdiction" to try "all civil causes in law and equity" and "all criminal causes" for the punishment of offenses by "any person" in the Indian Territory after January 1, 1898 (§ 1, 30 Stat. 83). The 1897 Act also made the laws of the United States and Arkansas then in force in the Indian Territory applicable to "all persons therein, irrespective of race" (§ 1, 30 Stat. 83). Second, Section 28 of the Curtis Act (Act of June 28, 1898, ch. 517, 30 Stat. 495, 504-505) abolished all tribal courts in the Indian Territory,[3]

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[2] Where offenses against the laws of the United States were punishable by death or imprisonment at hard labor, the circuit and district courts for the Western District of Arkansas and the Eastern District of Texas continued to exercise exclusive jurisdiction (§ 33, 26 Stat. 96-97), as they had before (Act of Mar. 1, 1889, ch. 333, §§ 17, 18, 25 Stat. 786-787; *Oliphant*, 435 U.S. at 200 & n. 10). The jurisdiction of those courts subsequently was transferred to the United States court for the Indian Territory by Section 9 of the Act of March 1, 1895, ch. 145, 28 Stat. 693, 697.

[3] The effective date of Section 28 of the Curtis Act was postponed until October 1, 1898, as regards the Chickasaw, Choctaw and Creek

and Section 26 of that Act provided that "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory" (30 Stat. 504). Third, in the Act of April 28, 1904, Congress once again provided that "[a]ll the laws

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Tribes (30 Stat. 504, 505), in order to afford those Tribes an opportunity to ratify allotment agreements with the United States that had been negotiated with the Commission to the Five Civilized Tribes (known as the Dawes Commission) and that were set forth, as amended, in the Curtis Act itself. See §§ 29, 30, 30 Stat. 505-519. The Act provided that if the Tribes ratified the agreements, the Curtis Act would apply to those Tribes only to the extent it did not conflict with the agreements (§§ 29, 30, 30 Stat. 505, 514). The Choctaw and Chickasaw Nations ratified their joint agreement, which retained the exclusive jurisdiction of the United States courts in the Indian Territory over cases involving real estate and certain enumerated offenses, "without reference to race" (§ 29, 30 Stat. 511), but apparently permitted the tribal courts to exercise concurrent jurisdiction in other matters solely involving members of the Tribes. The Seminole Nation entered into a separate agreement (Act of July 1, 1898, ch. 542, 30 Stat. 567), which conferred exclusive jurisdiction on the United States court for the Indian Territory in certain civil and criminal cases "without reference to race or citizenship," but otherwise provided that "the courts of said nation shall retain all the jurisdiction which they now have" (30 Stat. 569).

The Creek Nation did not ratify the agreement that had been negotiated with the Dawes Commission, but it later entered into a different agreement. See Act of March 1, 1901, ch. 676, 31 Stat. 861, as supplemented by the Act of June 30, 1902, ch. 1323, 32 Stat. 500. That agreement provided that it was not to "be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress" (§ 47, 31 Stat. 873). (In *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), cert. denied, No. 88-798 (Jan. 9, 1989), the court held that the authority of the Creek Nation to establish tribal courts was reinstated by Section 3 of the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. 503.) The Cherokee Nation had refused to negotiate even a ~~ten~~tative agreement with the Dawes Commission, but it entered into an agreement in 1901 that likewise declined to revive the tribal courts. Act of Mar. 1, 1901, ch. 675, § 72, 31 Stat. 859.

of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise" (ch. 1824, § 2, 33 Stat. 573). See *Stewart* v. *Keyes*, 295 U.S. 403, 409 (1935). "Thus the congressional enactments gradually came to the point where they displaced the tribal laws and put in force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as white persons" (*Marlin* v. *Lewallen*, 276 U.S. 58, 62 (1928)).

The allotment agreements with the Five Tribes contemplated that the tribal governments would cease to exist by March 4, 1906. However, in light of difficulties in the enrollment and allotment process, as well as Indian resistance to that process, the tribal governments were extended indefinitely in 1906. See Jt. Res. No. 7 of Mar. 2, 1906, 34 Stat. 822; Five Tribes Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148; *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1118-1131 (D.D.C. 1976), aff'd, 581 F.2d 949 (D.C. Cir. 1978). Nevertheless, all tribal taxes were abolished as of December 31, 1905 (§ 11, 34 Stat. 141). This then, was the state of affairs when Congress considered the admission of Oklahoma to the Union in 1906.

2. The Act of June 16, 1906, ch. 3335, 34 Stat. 267, authorized the creation of the State of Oklahoma out of the Oklahoma and Indian Territories. Section 16 of the Enabling Act, 34 Stat. 276, provided that cases arising under federal law that were then pending in the district courts of the Oklahoma Territory and in the United States courts in the Indian Territory were to be transferred to the newly created United States District Courts for the Western and Eastern Districts of Oklahoma, respectively. Under Section 20 of the Enabling Act, 34 Stat. 277, all cases pending in the district courts of the Oklahoma Territory and the United States courts in the Indian Territory

that were not transferred to the new federal district courts—*i.e.*, cases of a local nature—were transferred to the courts of the State of Oklahoma. See *Southern Surety Co.* v. *Oklahoma*, 241 U.S. 582 (1916). In addition, the laws of the Oklahoma Territory were extended to the Indian Territory, until the new legislature of Oklahoma should provide otherwise. §§ 2, 13 & 21, 34 Stat. 268, 275, 277-278. See *Stewart* v. *Keyes*, 295 U.S. at 409-410; *Jefferson* v. *Fink*, 247 U.S. 288, 292-293 (1918).[4]

3. In *Ex parte Nowabbi*, 61 P.2d 1139 (1936), the Oklahoma Court of Criminal Appeals held that the State of Oklahoma has jurisdiction to prosecute an Indian for a crime committed against another Indian on a restricted

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[4] Congress also passed a number of statutes after statehood that subjected the lands of members of the Five Tribes to state jurisdiction and relaxed federal restrictions on such lands. For example, in the Act of May 27, 1908, ch. 199, 35 Stat. 312, Congress eliminated all restrictions on alienation of allotments of persons having less than one-half Indian blood and permitted alienation of all but a 40-acre homestead for allottees having between one-half and three-quarters Indian blood. See *Stewart* v. *Keyes*, 295 U.S. at 411-412, 415. In the Act of June 14, 1918, ch. 101, 40 Stat. 606, Congress vested the state courts with jurisdiction over the lands of allotted members of the Five Tribes in heirship proceedings and subjected the lands of full-blood members to state laws governing the partition of real property. See *Shade* v. *Downing*, 333 U.S. 586 (1948); *United States* v. *Hellard*, 322 U.S. 363 (1944). Section 1 of the Act of April 12, 1926, ch. 115, 44 Stat. 239, provided that restrictions on allotments were removed upon death, but that a full-blood member could convey inherited or devised restricted land only with the permission of the state court having jurisdiction over the estate. Section 2 of the 1926 Act, 44 Stat. 240, made the state statutes of limitations applicable to restricted Indians of the Five Tribes and their heirs and grantees. In 1947, Congress confirmed that all restrictions on lands belonging to members of the Fives Tribes were to be removed upon the death of the original owner, but required state court approval of alienation if the heir was of one-half or more Indian blood. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731.

allotment in the original territory of the Five Civilized Tribes in eastern Oklahoma.[5] The Secretary of the Interior—after an exhaustive study of the relevant statutes, including the Indian Department Appropriations Act of 1897 and the Curtis Act—likewise took the position in a letter to the Attorney General dated August 17, 1942, that the State has jurisdiction over the conduct of Indians on restricted allotments of the Five Civilized Tribes (App., *infra*, 1a-5a). That position was reaffirmed in a letter from the Secretary to the Attorney General dated March 27, 1963 (App., *infra*, 6a-9a).

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[5] The State would have been without jurisdiction under the usual rules applicable to "Indian country," which is now defined to include not only lands within an Indian reservation, but also trust or restricted allotments, whether or not within the boundaries of a reservation. See 18 U.S.C. 1151; *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Pelican*, 232 U.S. 442, 449-450 (1914). Under the usual rules, in the absence of an Act of Congress specifically conferring jurisdiction on the State (such as the special Oklahoma statutes discussed in the text or Public Law 280, 18 U.S.C. 1162), a State has no jurisdiction over a crime committed by an Indian in Indian country. If the crime is committed by an Indian against a non-Indian or by a non-Indian against an Indian, the federal government has jurisdiction under 18 U.S.C. 1152. The second paragraph of 18 U.S.C. 1152 makes clear that it does not apply to offenses by one Indian against the person or property of another Indian or by an Indian who has been punished by the Tribe. However, Congress separately conferred federal jurisdiction over certain "major crimes" committed by an Indian. 18 U.S.C. 1153. The Tribe also has jurisdiction over crimes committed by an Indian. Where the victim is also an Indian, the jurisdiction of the Tribe ordinarily is exclusive, unless the offense falls within the Major Crimes Act. On the other hand, where both the perpetrator and victim are non-Indians, the State has exclusive jurisdiction. *United States* v. *McBratney*, 104 U.S. 621 (1881).

B. The proceedings in this case

1. Respondents Chester Lee Brooks (a/k/a Achisson Amenshi) and Larry Joe Brooks, who are members of the Delaware Tribe of Indians, operated a "smoke shop" on part of a restricted allotment that they leased from a member of the Creek Nation. Pet. App. 4a, 20a. Respondents were charged in the District Court of Tulsa County, Oklahoma, with the misdemeanor offenses of wilfully failing to produce records of their cigarette sales and wilfully preventing inspection of their premises by representatives of the Oklahoma Tax Commission, in violation of Okla. Stat. Ann. tit. 68, § 315 (West 1966) (Pet. App. 1a-3a).

On respondents' motion, the district court dismissed the informations for lack of jurisdiction (Pet. App. 123a-125a). The court concluded that the restricted allotment on which the smoke shop was located is "Indian country" within the meaning of 18 U.S.C. 1151(c) and that the State of Oklahoma therefore does not have jurisdiction over a crime committed by an Indian on the allotment (Pet. App. 124a). In the court's view, respondents must be treated as Indians for these purposes even though they are members of the Delaware Tribe and the crime allegedly was committed on a restricted Creek allotment (*ibid.*).

2. The State of Oklahoma appealed the dismissal of the prosecutions to the Court of Criminal Appeals of Oklahoma, the highest court of review for criminal cases. That court consolidated the case with *State* v. *Klindt,* S-84-781, which involves an assault with a dangerous weapon and interference with officials of the Oklahoma Tax Commission at a smoke shop on a trust allotment that the Delaware Tribe leased from a member of the Cherokee Nation. Pet. App. 20a-21a, 76a-79a. In a decision rendered on November 7, 1986, the Court of Criminal Appeals affirmed the dismissal of the informations in the in-

stant case, but remanded *Klindt* for a determination whether the defendant is an Indian (Pet. App. 19a-32a). Overruling the 50-year old precedent of *Ex parte Nowabbi* (Pet. App. 26a-29a), the court held that trust or restricted allotted lands of the Five Tribes are "Indian country" for purposes of the federal jurisdictional statutes, 18 U.S.C. 1151-1153, and that the State does not have jurisdiction over crimes committed by Indians on those lands (Pet. App. 21a-23a). However, the court made no mention of the Indian Department Appropriations Act of 1897, the Act of April 28, 1904, or the Oklahoma Enabling Act, discussed above (see pages 4-7, *supra*), which made the laws of Oklahoma applicable to members of the Five Tribes irrespective of the status of their lands.[6]

3. On the State's petition, the Court of Criminal Appeals granted rehearing in this case and *Klindt,* withdrew its prior opinion in those cases, and separated the two cases for further consideration (Pet. App. 33a-35a). Thereafter, on October 14, 1988, the Court of Criminal Appeals issued its opinion on rehearing in the instant case (Pet. App. 1a-18a).

This time, the court deemed it unnecessary to decide whether the allotments of members of the Five Civilized Tribes are "Indian country" within the meaning of 18 U.S.C. 1151(c) (Pet. App. 6a-7a, 12a). The court acknowledged that even if the allotment at issue here is "Indian country" and respondents are regarded as Indians for jurisdictional purposes, they would not be wholly immune from the State's cigarette tax laws. The court reasoned that

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[6] In *State ex rel. May* v. *Seneca-Cayuga Tribe,* 711 P.2d 77, 81 (Okla. 1985), the Supreme Court of Oklahoma criticized *Nowabbi* but did not overrule it. The Supreme Court emphasized the unique status of the Five Civilized Tribes and distinguished the Quapaw and Seneca-Cayuga Tribes (*id.* at 80-81). See also Pet. App. 16a n.1 (Bussey, J., dissenting).

under *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), the State may tax sales of cigarettes by Indians to "non- or off-reservation Indians" in Indian country and may impose record-keeping requirements on Indians regarding those sales (Pet. App. 10a-13a). But the court nevertheless held that the informations in this case must be dismissed, explaining (*id.* at 14a):

> Because the informations in this case did not relate specifically to [respondents'] cigarette sales to non-Indians or off-reservation Indians, and thus did not meet the United States Supreme Court prerequisite to the exercise of state tax authority over Indians on Indian land, we hold that the State of Oklahoma did not have the power to prosecute and the district court did not have jurisdiction to adjudicate this controversy.

The court, however, failed to address the more fundamental and potentially dispositive question presented in this case: whether the restricted allotment on which respondents operated the smoke shop is even the kind of Indian land to which the principles of *Moe* and *Colville* apply, since (i) the allotment is not an Indian *reservation,* as in *Moe* and *Colville,* and (ii) state law is broadly applicable to members of the Five Civilized Tribes in any event by virtue of the Indian Department Appropriations Act of 1897, the Act of April 28, 1904, and the Oklahoma Enabling Act.[7]

ARGUMENT

The decision of the Oklahoma Court of Criminal Appeals is contrary to the legal principles that have governed

[7] As of the date of this filing, the Oklahoma Court of Criminal Appeals has not rendered its decision on rehearing in *Klindt.*

jurisdiction over Indians in the former territory of the Five Civilized Tribes for many years. When Oklahoma was admitted to the Union, Congress conferred on the State broad jurisdiction over the members of the Five Tribes. That jurisdiction permits Oklahoma to impose its cigarette tax and related record-keeping requirements even on sales made by Indians to other Indians on restricted allotments and to bring prosecutions in state court against Indians who violate the State's cigarette tax statute or other laws. The Court of Criminal Appeals therefore was fundamentally mistaken in its underlying assumption that the allotment in this case is subject to the jurisdictional principles that were applied to on-reservation sales to Indians in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980).

Questions concerning the scope of the State's jurisdiction over trust and restricted allotments of members of the Five Tribes are of considerable importance both to the State of Oklahoma and to the United States. The decision below creates considerable uncertainty regarding the application of the State's criminal, regulatory and taxing laws on those allotments. Moreover, if the State does not have general jurisdiction over the conduct of Indians on those lands, the United States would be required to exercise criminal jurisdiction, despite all the problems inherent in law enforcement where there is a checkerboard pattern of land ownership. Review by this Court therefore is warranted.

1. a. The major premise of the decision below—that the State of Oklahoma has only limited jurisdiction over Indians on the trust or restricted allotments of members of the Five Civilized Tribes—is contrary to the entire history of those Tribes since before the turn of the century.

As explained above (see page 4, *supra*), the Indian Department Appropriations Act of 1897 vested the United

States courts in the Indian Territory with exclusive jurisdiction over all crimes committed by "any person" in the Indian Territory (§ 1, 30 Stat. 83). And because there was no territorial legislature to prescribe local laws to govern Indians in the Indian Territory, Congress itself supplied that local law by making the laws of the State of Arkansas that were then in force in the Indian Territory applicable to "all persons therein, irrespective of race" (§ 1, 30 Stat. 83). This sweeping provision plainly admitted of no exception for "persons" who were Indians. See also Act of April 28, 1904, ch. 1824, § 2, 33 Stat. 573; *Stewart* v. *Keyes,* 295 U.S. at 409; *Marlin* v. *Lewallen,* 276 U.S. at 62.

Against this background, it was to be expected that when Oklahoma was admitted to the Union, Congress would continue to treat members of the Five Civilized Tribes essentially the same as non-Indians insofar as the jurisdiction of the new State was concerned. Accordingly, although jurisdiction over federal cases pending in the district courts of the Oklahoma Territory and the United States courts in the Indian Territory was transferred to the newly-created United States District Courts for the Western District and Eastern District of Oklahoma, respectively, cases of a local nature—including those arising under the laws of Arkansas in the former Indian Territory—were transferred to the courts of the State of Oklahoma. §§ 16-20, 34 Stat. 276-277. This necessarily included cases involving Indians on Indian lands, to which the laws of Arkansas had been extended in 1897 and 1904.[8] Moreover, in order to supply a uniform body of local law throughout

[8] The state courts of Oklahoma are made the "successor[s]" to the United States courts in the Indian Territory (§§ 18 and 19, 34 Stat. 277), and there is no suggestion that the occurrence of a crime on restricted land was to affect that status.

the State immediately upon statehood, Congress specified that the laws in force in the Oklahoma Territory at the time of statehood were to be extended over the entire State (including the former Indian Territory and the persons and property of the members of the Five Civilized Tribes within that Territory), until modified by the legislature of the newly admitted State. §§ 2, 13 and 21, 34 Stat. 268, 275, 277-278. The effect was to substitute Oklahoma law for Arkansas law, and thereby to bring the members of the Five Civilized Tribes directly under the judicial jurisdiction and substantive laws of the State of Oklahoma, except where Congress expressly provided otherwise. *Stewart* v. *Keyes,* 295 U.S. at 415; *Jefferson* v. *Fink,* 247 U.S. at 292-295; *Shultis* v. *McDougal,* 225 U.S. 561, 571-572 (1912).

b. As a result of the statutory provisions just discussed, Oklahoma Indians in the former territory of the Five Civilized Tribes have long been subject to the broad application of state laws. See also note 4, *supra.* By the same token, the scattered trust and restricted allotments of members of the Five Civilized Tribes have not constituted the sort of areas in which Indian Tribes typically govern their own members free from state interference.[9]

Consistent with this view, the Court of Criminal Appeals expressly held in *Nowabbi* in 1936 that the State of Oklahoma has criminal jurisdiction over a crime committed by one Indian against another Indian on a restricted allotment in the former territory of the Five

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[9] Our discussion of restricted land owned by individual Indians does not necessarily apply to tribal land, which may present different considerations. See *Indian Country, U.S.A., Inc.* v. *Oklahoma Tax Commission,* 829 F.2d 967 (10th Cir. 1987), cert. denied, No. 87-1068 (June 27, 1988) (barring state regulation of bingo games operated by the Creek Tribe on tribal land that had never been allotted or otherwise disposed of).

Tribes.[10] The Secretary of the Interior took the same position in 1942, after thoroughly studying the matter, and the Secretary affirmed that position in 1963. See page 8, *supra*. This longstanding and widely shared view of the United States and the State of Oklahoma that the State has jurisdiction over the trust and restricted lands of individual members of the Five Civilized Tribes is entitled to great weight. Compare *Solem* v. *Bartlett*, 465 U.S. 463, 478-479 (1984); *Oliphant*, 435 U.S. at 206.

This Court, too, has recognized the broad jurisdiction of the State of Oklahoma over members of the Five Civilized Tribes. In *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), the Court sustained the application of state estate taxes to restricted property of members of the Five Tribes. The Court stressed that the principles that had supported the implication of tax exemptions for other Indians "do not fit the situation of the Oklahoma Indians" (319 U.S. at 603), and it continued (*id.* at 603-604, 608-609 (emphasis added)):

> Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia*, *supra*; and, unlike the Indians involved in *The Kansas Indians* case, *supra*, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.
>
> * * * * *
>
> Oklahoma supplies for them and their children schools, roads, *courts, police protection* and all other benefits of an ordered society.

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[10] It seems clear that the State exercised such jurisdiction prior to *Nowabbi*. See *McGlassen* v. *State*, 130 Pac. 1174 (Okla. Crim. App. 1913) (considering charges against an Indian for "malicious mischief" on an allotment within the former territory of the Choctaws and Chickasaws, without suggesting any lack of state jurisdiction).

Similarly, in *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 171 (1973), the Court distinguished its decision upholding the state taxes in *Oklahoma Tax Commission* on the ground that it presented a situation "where Indians have left the reservation and become assimilated into the general community." See also S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935), quoted at Pet. 39-40.[11]

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[11] It might be argued that the State lacks general civil and criminal jurisdiction over restricted land in the former territory of the Five Civilized Tribes by virtue of 18 U.S.C. 1151. Section 1151 defines Indian country as including Indian reservations under the jurisdiction of the United States, dependent Indian communities, and allotments. Although this definition describes the scope of criminal jurisdiction, it also is frequently applied in a civil context. See *DeCoteau* v. *District County Court,* 420 U.S. 425, 427, n.2 (1975).

Section 1151 was added to Title 18 of the United States Code in 1948, as part of the recodification of the federal criminal laws. Act of June 25, 1948, ch. 645, 62 Stat. 757. The 1948 revision was intended to codify the original intent of Congress. Allotments were included as Indian country based on *United States* v. *Pelican,* 232 U.S. 442 (1914). See S. Rep. No. 1620, 80th Cong. 2d Sess. 1 (1948); H.R. Rep. No. 304, 80th Cong. 1st Sess. A92 (1947) (reviser's notes). *Pelican* held that an allotment was "Indian country" because the land was "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians" (232 U.S. at 447). Restricted fee Osage allotments were found to satisfy this test because they were subject to federal control. See *United States* v. *Ramsey,* 271 U.S. 467, 471 (1926).

By contrast, restricted allotments of members of the Five Tribes do not fit the description in *Pelican.* Congress gave the state courts jurisdiction over heirship proceedings involving Five Tribes allotments and subjected them to state partition laws (Act of June 14, 1918, ch. 101, 40 Stat. 606); provided that state statutes of limitation would apply to restricted members of the Five Tribes (Act of Apr. 12, 1926, ch. 115, § 2, 44 Stat. 240); and required that any alienation of such land be approved by the state courts rather than the federal government (Act of Aug. 4, 1947, ch. 458, 61 Stat. 731). See note 4, *supra.* In any event, there is no indication that when Congress revised the federal criminal code in 1948, it intended implicitly to repeal the various statutes enacted at the turn of the century that conferred on the State broad jurisdiction over members of the Five Civilized Tribes (see App., *infra,* 7a).

2. The Oklahoma Court of Criminal Appeals also erred in extending the immunity from state taxes for on-reservation transactions involving Indians, which was recognized in *Moe* and *Colville,* to transactions occurring on an allotment situated outside any reservation. In both *Moe* and *Colville,* the Court recognized an immunity from state taxation for sales of cigarettes to Indians only because those sales occurred within a recognized reservation. See *Moe,* 425 U.S. at 475-481; *Colville,* 447 U.S. at 138, 144, 150-151 & n.26, 152, 160-161; see also *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 207-208, 214-216 & n.17 (1987); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 179-181 (1973). No similar immunity to the general taxing jurisdiction of the State attaches outside a reservation (*Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973)), except, perhaps, where the state tax would be imposed directly on trust property (*id.* at 158-159). This aspect of the decision below may have broad implications in Oklahoma, as well as other States in which there are many allotments outside the boundaries of an established reservation.[12]

The Court of Criminal Appeals' recognition of an immunity from the state cigarette tax laws for off-reservation sales by Indians to Indians is especially unwarranted in this case, because the Indian vendor is not even a member of the Tribe to which the owner of the allotment belongs. Because respondents are not members of the Creek Nation, and because the Creek Nation's sovereignty therefore is not implicated, there would appear to be no arguable impediment to the application of the State's tax and record-keeping requirements in the circumstances of this

[12] Moreover, contrary to the court below (Pet. App. 14a), this Court has held that, even on a reservation, a State may require Indian vendors of cigarettes to keep records of their sales to both Indians and non-Indians. See *Colville,* 447 U.S. at 159-160.

case. Cf. *Colville,* 447 U.S. at 160; *Rice* v. *Rehner,* 463 U.S. 713, 718-721 (1983).

3. The issues raised by the decision of the Court of Criminal Appeals are of considerable practical importance. The Department of the Interior informs us that as of 1985, there were approximately 413,000 acres of trust or restricted individual Indian lands—comprising an estimated 20,000 separate tracts—within the original territory of the Five Civilized Tribes in eastern Oklahoma. If the State lacks general criminal jurisdiction over Indian activities on those widely scattered tracts, then the United States would be required to exercise jurisdiction over crimes committed by or against Indians on those lands. Law enforcement would be rendered very difficult, because as this Court stated in *Seymour* v. *Superintendent,* 368 U.S. 351, 358 (1962):

> [W]here * * * the existence or nonexistence of federal jurisdiction depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tracts books in order to determine whether criminal jurisdiction over each particular offense * * * is in the State or Federal Government.

Moreover, in the case of a restricted allotment, the status of the land could not even be ascertained by an examination of tract books, because legal title is in the Indian owner and the continuation of restrictions against alienation would turn on the quantum of Indian blood of the owner and other factors. See notes 4 & 11, *supra.* The situation could be complicated still further in many cases if only a fractional interest in the allotment were subject to restraints against alienation by virtue of the fact that only one of a number of joint owners possesses the requisite quantum of Indian blood.[13]

[13] The need for clarification is exemplified by *United States* v. *Sands,* No. 88-21-Cr. (E.D. Okla. Sept. 13, 1988). There, a Muscogee

The implications of the decision below are broader still because of the Court of Criminal Appeals' invocation of the principles of immunity applied in *Moe, Colville, Cabazon* and related cases in the context of state jurisdiction within the boundaries of an Indian reservation. The decision below therefore threatens to convert the trust and restricted allotments of individual members of the Five Civilized Tribes into thousands of "mini-reservations" scattered throughout eastern Oklahoma, on which Indians of any Tribe might enjoy an immunity from an as-yet-undetermined range of state laws. The result would be to create grave uncertainty regarding the application not only of the criminal and civil laws of Oklahoma that govern judicial disputes, but also the State's taxing, regulatory and other laws. The Court should grant review in this case to prevent this uncertainty and to affirm the jurisdiction of the State that has been recognized by the state and federal governments since Oklahoma was admitted to the Union.[14]

(Creek) Indian was convicted of the murder of another Muscogee Indian on a restricted allotment. The United States brought that prosecution only after the state court had dismissed charges against the defendant for lack of jurisdiction. *State* v. *Sands,* CRS 87-149 (Dist. Ct. Okfuskee County, Okla., Feb. 23, 1988).

[14] In its first opinion in the instant case, the Court of Criminal Appeals overruled its prior decision in *Nowabbi.* That first opinion was withdrawn, however, and the Court of Criminal Appeals' second opinion in the instant case, at issue here, does not mention *Nowabbi* and therefore presumably does not overrule it. It is possible that the Court of Criminal Appeals will address the continued force of *Nowabbi* when it renders its decision on rehearing in *Klindt.* However, for several reasons, we do not believe that the Court should deny certiorari here and await the decision in *Klindt.* First, it is possible that the Court of Criminal Appeals will again avoid a resolution of the jurisdictional issue in *Klindt* because the record does not affirmatively establish that the defendant is an Indian. Second, if this Court in the

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
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FEBRUARY 1989

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instant case sustains the application of the State's tax and related record-keeping statutes to sales by Indians to Indians on trust or restricted allotments on the ground that the Indian Department Appropriations Act of 1897, the Act of April 28, 1904, and the Oklahoma Enabling Act vest the State with plenary jurisdiction over conduct on such lands, it will follow *a fortiori* that the State's general criminal laws are applicable to offenses committed by Indians on such lands and that the result in *Nowabbi* continues to be sound.

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Office of the Solicitor

Aug. 17, 1942

The Honorable

The Attorney General.

Sir:

In a letter of April 28, 1941, from the Assistant Attorney General (your file WB:CAP:vng 90-2-017-60) the views of this Department were requested respecting the jurisdiction of the State and Federal courts in Oklahoma in cases involving crimes committed by and against Indians on the restricted Indian allotments in the area which was the Indian Territory and those in the area which was the Oklahoma Territory.

A mass of statutory provisions showing the changing and developing jurisdiction of courts in these areas has been found and most of the relevant provisions have been summarized or quoted in the attached memorandum. Because of the complexities of the matter this Department cannot speak with certainty with respect to the present jurisdiction but is presenting the following analysis and conclusions for your consideration.

Prior to the creation of the Oklahoma Territory and the Indian Territory by the act of May 2, 1890 (26 Stat. 81),

the whole area was known as the Indian Territory. During this period the Government recognized the exclusive jurisdiction of the Indian tribes over their own members and even over nonmembers within their territories. There were a few statutes defining crimes within this Territory and providing for a United States court for the prosecution of these crimes. However, as indicated in the reference to these statutes in paragraphs 1, 2, and 3 of the attached memorandum, these statutory provisions excluded from their application crimes committed by Indians. The act of March 3, 1885 (23 Stat. 385, 18 U. S. C. sec. 548), probably did not apply to the old Indian Territory, since there were no Territorial organization, laws and courts to function under the statute (*In re Jackson,* 40 Fed. 372, C. C. Kans., 1889).

Upon organization under the act of May 2, 1890, the United States district courts in the Oklahoma Territory and the Indian Territory were given jurisdiction by sections 12 and 36, respectively, of crimes by Indians against Indians of other tribes to the same extent as if such crimes were committed by citizens. This grant of jurisdiction increased the jurisdiction which I believe these courts automatically obtained under section 548 of title 18 of the named crimes committed by Indians against Indians or others. These district courts had a dual role. As United States courts they enforced the Federal laws and as Territorial courts they enforced the Territorial laws, being at the outset the laws of Nebraska in the Oklahoma Territory and the laws of Arkansas in the Indian Territory. As United States courts enforcing Federal law they had jurisdiction over crimes committed by white persons against either Indians or other persons under section 217 of title 25 of the United States Code (*Brown* v. *United States,* 146 Fed. 975 (C. C. A. 8th, 1906)). As Territorial courts they could enforce section 548 of title 18 by the trial of the In-

dians committing the crimes named therein in the same manner as such crimes were tried when committed by other persons. As Territorial courts they could also try Indians for crimes committed against Indians not members of the tribe in the same manner as in the case of other persons.

The act of June 7, 1897 (30 Stat. 83), and subsequent statutes relating to the Indian Territory completely altered the situation in that Territory with respect to jurisdiction over Indian crimes. The 1897 act placed in the district courts jurisdiction over all crimes committed by any person in the Indian Territory, and the laws of Arkansas in force in the Territory were made to apply to all persons, regardless of race. Subsequent acts abolished the Indian courts and tribal jurisdiction and organization. These acts, therefore, removed the essential characteristic of the Indian country, which was the application of tribal laws within the area. Since the Territorial laws were made to apply to all persons in the Indian Territory, both section 548 of title 18 and section 217 of title 25 were apparently superseded. This conclusion is fortified by the act of March 3, 1901 (31 Stat. 1447), which gave citizenship to every Indian in the Indian Territory and by the last proviso in the act of May 8, 1906 (34 Stat. 182), which provided that the Indians in the Indian Territory should not be covered by the provision subjecting all Indian allottees to the exclusive jurisdiction of the United States until the issuance of fee simple patents. No similar changes in jurisdiction were made in the Oklahoma Territory.

Upon the organization of the State of Oklahoma pursuant to the Enabling Act of June 16, 1906 (34 Stat. 267), the State courts succeeded to the jurisdiction of the Territorial courts, except as to the crimes defined by Federal law which were placed within the jurisdiction of the Federal courts. The State courts, therefore, apparently ac-

quired jurisdiction of all Indian crimes in that part of the State which had been the Indian Territory. In that part of the State which had been Oklahoma Territory it is my opinion that the second part of section 548 of title 18 had immediate application, placing in the Federal courts jurisdiction of the named crimes committed by Indians in Indian reservations in the States. This part of section 548 did not apply to the Indian Territory part of the State, since the Indian reservations therein had lost their character as Indian country.

The conclusions of this Department thus follow substantially the decision of the Supreme Court in the case of *United States* v. *Ramsey,* 271 U. S. 467, and the opinion of the Oklahoma Supreme Court in *Ex parte Nowabbi,* 61 P. (2d) 1139. The *Ramsey* case held that a restricted allotment on the Osage Reservation, which had been a part of the Oklahoma Territory, was Indian country within the meaning of section 217 of title 25, and that therefore the Federal court had jurisdiction of a crime committed by a white person against an Indian. Of course, any jurisdiction under section 217 of crimes exclusively involving white persons on the Indian reservations was lost by the acquisition of statehood, as in the case of other States. The *Nowabbi* case held that the State courts had jurisdiction over a crime by one Indian against another committed on a restricted allotment in the area formerly the Indian Territory.

The conclusions of the Department may be summarized as follows:

(1) In that part of Oklahoma which was the Indian Territory a restricted Indian allotment is no longer Indian country and section 217 of title 25 does not apply to give the Federal courts jurisdiction of crimes against Indians and section 548 of title 18 does not apply to give the Federal courts jurisdiction of the named crimes by In-

dians. Jurisdiction of all crimes by and against Indians is in the State courts.

(2) In that part of the State which was Oklahoma Territory a restricted Indian allotment continues to have the character of Indian country in the same manner as restricted allotments and reservations elsewhere in the country, with the possible exception of crimes committed by Indians against nonmember Indians, which crimes are apparently within the jurisdiction of the State courts as a result of the 1890 statute. On these allotments both section 217 of title 25 and section 548 of title 18 apply. Crimes between Indians of the same tribe which are not covered by section 548 remain subject to tribal jurisdiction.

The presentation of these legal conclusions should be accompanied by some statement of the practical situation. None of the tribes in Oklahoma has exercised criminal jurisdiction in recent years and none has a court of Indian offenses established either by the tribe or under the regulations of this Department. It is therefore important that some definite criminal procedure be established for crimes not embraced by Federal or State law. In view of the complexities of jurisdiction in Oklahoma and in view of this practical problem this Department would be glad to receive your suggestions as to the substance of a bill which might be presented to Congress on the subject.

Very truly yours,

(Sgd.) OSCAR L. CHAPMAN
Assistant Secretary.

Enclosure 690427.

CTL:mvp

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

Mar. 27, 1963

Dear Mr. Attorney General:

On November 29, 1962, you wrote me seeking an opinion as to whether it would be a constructive measure for the Department of Justice to appear *amicus curiae* or on behalf of Indians in court cases where States, under questionable authority, have asserted criminal jurisdiction over offenses committed by Indians in Indian country.

Mr. Barry, the Solicitor of the Department of the Interior, has spoken informally with Assistant Attorney General Clark in the interval since your letter was received, pointing out that our reply would be delayed because of the complicated nature of the problem and the need for giving it additional study.

As you are no doubt aware, several States had asserted civil and criminal jurisdiction in Indian country prior to the passage of Public Law 280, 83d Congress, despite the fact that no Federal statutes of relinquishment and transfer had been enacted. Foremost among these were Michigan, Oklahoma, North Carolina, and Florida. Jurisdiction was also been asserted by certain counties in such States as Washington, Nevada, and Idaho. Following the enactment of Public Law 280, Nevada, Washington, and Florida passed legislation either bringing Indian country under their jurisdiction, or permitting tribes to petition for such jurisdiction, or providing local option for the

assumption of jurisdiction by individual counties. The other States mentioned above did not take such action, although they have continued to assert jurisdiction. Officials of both Oklahoma and North Carolina have contended in letters to this Department that they have criminal jurisdiction over the Indians of their States irrespective of the fact that they do not have such jurisdiction under a specific Federal statute, and the States themselves have not taken positive action under the provisions of Public Law 280.

On August 17, 1942, the views of this Department concerning the jurisdiction of the State of Oklahoma over offenses committed by and against Indians on restricted Indian allotments in the State was furnished your Department. Your reference on the matter was WB:CAP 90-2-017-60. The adoption in 1948 of the current statutory definition of Indian country in 18 U.S.C. § 1151 does not appear to require revision of the jurisdictional conclusions stated in our 1942 letter and summary. These conclusions were that restricted Indian allotments in the part of Oklahoma which was formerly Indian Territory were no longer Indian country, but that such allotments in the part of the State which was formerly Oklahoma Territory continued to have the character of Indian country in the same manner as restricted allotments elsewhere in the country, with the possible exception of crimes committed by Indians against non-member Indians. In the latter instance, it was pointed out that such crimes apparently were within the jurisdiction of the State courts as a result of the Act of May 2, 1890 (26 Stat. 81).

It is generally true that in the areas where States are exercising criminal jurisdiction under doubtful authority, the Indian tribes are not in a financial position to assume any law and order responsibility for themselves. Furthermore,

the Bureau of Indian Affairs at this time does not have sufficient staff nor funds to take over law enforcement for them. If, however, the jurisdiction of the States within Indian country were to be successfully challenged by the Federal Government, it would then appear incumbent on our Department to provide the Indians approriate substitute systems of law and order. In this connection, we would need to explore present capabilities for establishing reservation courts, and you would undoubtedly wish to consider the impact that the prosecution of petty offenses under 16 U.S.C. § 1132 would have upon your United States Attorneys and the Federal Courts. Consideration will also have to be given to the fact that many of those Indians have long since abandoned tribal self-government and have become accustomed to looking to the State for the maintenance of law and order in their communities.

I therefore feel it vital to the overriding interest of the Indians in the maintenance of law and order that members of our two Departments confer on what presently can be done by our Departments to see that where States are determined not to have criminal jurisdiction over Indians in Indian country, a breakdown of law enforcement will not occur. I am suggesting that Solicitor Barry designate someone to represent his office in such discussions, and shall also ask Commissioner of Indian Affairs Phillco Rash to select a representative for this Bureau. These persons will, I am sure, be available to explore this matter further at a time agreeable with you and whichever officials

for the Department of Justice you may designate as your representatives.

Sincerely yours,

(Sgd.) STEWART L. UDALL
Secretary of the Interior

Hon. Robert F. Kennedy
Attorney General
Department of Justice
Washington 25, D.C.

Followup PRS 0755

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